Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of D.C. Circuit's ACA International Decision	)	CG Docket No. 18-152
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Advanced Methods to Target and Eliminate Unlawful Robocalls	)	CG Docket No. 17-59

COMMENTS OF THE A TO Z COMMUNICATIONS COALITION AND THE INSIGHTS ASSOCIATION

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SUMMARY

ACA International v. FCC marks a much-needed reset for the Commission's interpretation of the TCPA. The Commission's prior "impermissibly expansive" interpretations have fueled out-of-control class action cases that have distorted the consumer protection purposes of the TCPA. Rather than protecting consumers from abusive practices while balancing legitimate business communications, the current TCPA landscape has become a minefield that penalizes callers and discourages communications that benefit consumers.

These proceedings offer the Commission a chance to correct its course and to re-focus its TCPA rules on actual abusive marketing practices. In response to the Public Notice seeking comment on the interpretation of the TCPA in light of the D.C. Circuit's decision, the Joint TCPA Commenters urge the FCC to adopt a definition of an "automatic telephone dialing system" ("ATDS") that adheres to the language and intended purpose of the TCPA. Only equipment that has the actual (*i.e.*, present) ability to (a) generate random or sequential numbers and (b) to dial such numbers meets the statutory definition of an ATDS. Accordingly, only this equipment is covered by the TCPA and, to the extent that the calling public have moved to sophisticated predictive dialing equipment or other modern equipment that does not employ such abusive capabilities, the TCPA does not apply. The Joint TCPA Commenters support the Petition filed by the U.S. Chamber Institute for Legal Reform and 17 co-petitioners (including the Insights Association).

Further, in response to the Reassigned Numbers Second FNPRM, the Joint TCPA Commenters support the creation of a comprehensive database of reassigned numbers and urge the Commission to establish a reasonable safe harbor protection from liability when parties

consult the database before placing a call. The Commission's proposals to this vexing problem will help restore reliance on customer consent.

Further, the Joint TCPA Commenters urge the Commission to carefully examine what information is reported to the database in order to reduce both false negatives (changes not reported) and false positives (reports of a change that are not actually a change in the subscriber). The Commission should be particularly careful that false positives are reduced, due to the increased costs that such errors place on businesses (to attempt to re-obtain consent) and consumers (to confirm information that didn't actually change).

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COMMENTS OF THE A TO Z COMMUNICATIONS COALITION AND THE INSIGHTS ASSOCIATION

The A to Z Communications Coalition[1] and the Insights Association[2]

(collectively, the "Joint TCPA Commenters"), by their attorneys, hereby respectfully submit

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[1] The A to Z Communications Coalition is an informal coalition of entities concerned about over-reach in the Telephone Consumer Protection Act ("TCPA"). The Coalition is working to enact legislative and administrative rules that balance consumer protection against abusive telemarketing practices with legitimate attempts by businesses and others to provide useful and relevant information to consumers in a cost-effective manner.

[2] Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and data analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and analytics professionals and research and analytics departments inside of non-research companies and organizations. Marketing researchers are an essential link between businesses and consumers, and between political leaders and constituents; they provide important insights about consumer and constituent preferences through surveys, analytics, and other qualitative and quantitative research. On behalf of their clients—including the government, media, political campaigns, and commercial and non-profit entities—researchers design studies and collect and analyze data from small but statistically-balanced samples of the public. Researchers seek to determine the public's opinion and behavior regarding products, services, issues, candidates, and other topics in order to help develop new products, improve services, and inform public policy. The TCPA makes it exceptionally challenging, and legally hazardous, for telephone survey researchers to connect with the

these comments to the Federal Communications Commission ("Commission" or "FCC") in response to the Public Notice seeking comment on numerous questions related to the interpretation and implementation of the TCPA following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*,[3] as well as the Commission's Second Further Notice of Proposed Rulemaking which proposes to establish "one or more databases … to provide callers with the comprehensive and timely information they need to discover potential number reassignments before making a call" and asks whether the Commission should adopt a safe harbor for callers who utilize such database.[4]

As discussed in more detail herein, *ACA International* marks a much-needed reset for the Commission's interpretation of the TCPA. "Impermissibly expansive" FCC interpretations have fueled out-of-control class action cases that have distorted the consumer protection purposes of the TCPA. Rather than protecting consumers from abusive practices while balancing legitimate business communications, the current TCPA landscape has become a minefield that penalizes callers and discourages communications that benefit consumers. With the remand from the D.C. Circuit Court of Appeals and the Pai Commission's own actions aimed

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67.6 percent of American households who are essentially only reachable on their wireless phones.

3 *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of D.C. Circuit's ACA International Decision*, CG Docket No. 18-152 et al., Public Notice, DA 18-493 (rel. May 14, 2018) ("TCPA Public Notice"). *See also ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The TCPA Public Notice also seeks comment on a recent petition for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform and 17 co-petitioners. *See* U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018) ("U.S. Chamber Petition").

4 *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, FCC 18-31 (rel. Mar. 23, 2018) ("Reassigned Numbers Second FNPRM").

at abusive telemarketing practices, the Commission has an opportunity to restore balance and reason to the TCPA.

The Joint TCPA Commenters urge the Commission to replace the 2015 TCPA Order's[5] flawed interpretation of an "automatic telephone dialing system" ("ATDS") with one that adheres to the language and intended purpose of the TCPA. Businesses contacting their customers should be able to know whether their equipment is an ATDS or not, before a call is made. Additionally, the Commission should clarify that only the current features of the device are relevant, and that a caller must actually use the ATDS functionality to place a particular call in order to be subject to the TCPA for that call. These rulings would stem the land-rush of TCPA class actions that threaten to prevent appointment reminders, school notifications, marketing research surveys, political polls and other communications which the consumer wants (or needs) to receive.

Finally, the Joint TCPA Commenters commend the FCC for trying to tackle the problem of frequent turn-over in telephone numbers. The Commission's proposals to this vexing problem will help restore reliance on customer consent. The Joint TCPA Commenters urge the FCC to create a single, central database of reassigned numbers and to adopt a safe harbor for callers who make calls to reassigned numbers within a reasonable period after accessing the database.

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5 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, 30 FCC Rcd. 7961 (rel. July 10, 2015) ("2015 TCPA Order").

I. THE COMMISSION SHOULD ADOPT A CAREFULLY TAILORED DEFINITION OF ATDS

Following the D.C. Circuit's finding that the Commission's overly broad interpretation of the term ATDS as adopted in the 2015 TCPA Order[6] "fails to satisfy the requirement of reasoned decisionmaking,"[7] the TCPA Public Notice requests feedback on a number of pointed questions aimed at assisting the Commission to develop a sustainable and workable definition of what equipment falls within the scope of the statute. As explained herein, the Joint TCPA Commenters urge the Commission to define ATDS based on the plain language of the TCPA. Congress's chosen language is focused on the abusive contact practices that harmed consumers – namely, the use of equipment to generate and store random or sequential telephone numbers and then dial those numbers. Such "carpet-bombing" calling harms consumers and was prohibited by the TCPA. At the same time, however, targeted calling to consenting consumers, statistically valid samples and other groups are legitimate business practices that the TCPA permits. The approaches described in these comments not only adhere closely to this language, but also would best ensure that consumers receive information that is useful and desirable.

A. The Commission Should Interpret the Term "ATDS" in Accordance With the Plain Language of the TCPA

The TCPA Public Notice seeks comment on "what constitutes an [ATDS]."[8] In particular, the Commission asks what "functions a device must be able to perform to qualify as

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6 *See id.*, ¶ 10.

7 885 F.3d at 703.

8 TCPA Public Notice at 1.

an [ATDS]."[9] On this question, the Joint TCPA Commenters support the U.S. Chamber Petition's position that "in order to be an ATDS subject to Section 227(b)'s restrictions, dialing equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers."[10] This interpretation is consistent with the plain language of the statute, which is "the clearest indication of Congressional intent."[11] Indeed, the D.C. Circuit made clear in *ACA International* that the attempt by the Commission to adopt a broader definition of ATDS – one which would have "[brought] within the definition's fold the most ubiquitous type of phone equipment known,"[12] – smartphones – "would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers."[13]

Critically, this interpretation of an ATDS leaves unaffected sophisticated predictive dialer equipment. Predictive dialers are equipment designed to assist callers with

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9 *Id.* at 2.

10 U.S. Chamber Petition at 21.

11 *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (internal citations omitted). *See also* 2015 TCPA Order, Dissenting Statement of Commissioner Ajit Pai (observing that "[t]he statute lays out two things that an [ATDS] must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do those two things – if it cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers – then how can it possibly meet the statutory definition?").

12 885 F.3d at 698.

13 *Id.* at 698. In reaching this conclusion, the D.C. Circuit looked to the legislative history of the TCPA, and found that the statute was enacted in an effort to address issues related to approximately "30,000 businesses [that] actively telemarket goods and services to business and residential customers." *Id.*

contacting consumers from a set, loaded (not automatically generated) list of numbers. This equipment helps ensure that only those persons specifically chosen are reached by, for example, protecting against misdialed calls, and enforces legal, ethical or other restrictions on the time and frequency of calls to the consumer. Predictive dialers do not share the abusive features of old dialing equipment that generated phone numbers at random or following a sequential dialing pattern and dialed such numbers without human intervention. More importantly, a predictive dialer that cannot *generate* phone numbers cannot, by definition, be an autodialer. The Commission should clarify that modern predictive dialing equipment is not within the scope of the ATDS definition.

It should not be surprising to find that the telecommunications industry has moved beyond the crude dialing equipment that caused the harms Congress addressed in the TCPA. The court in *ACA International* astutely observed that

> "Congress need not be presumed to have intended the term [ATDS] to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a 'paging service' or 'specialized mobile radio service,' ... yet those terms have largely ceased to have practical significance."[14]

Accordingly, rather than adopting an interpretation of ATDS that results in "a several-fold gulf between congressional findings and [the] statute's suggested reach,"[15] the Commission instead should make clear that equipment only qualifies as an ATDS if it satisfies the specific defined criteria set forth in the statute.

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14 *Id.* at 699.

15 *Id.* at 698.

Moreover, as the U.S. Chamber Petition observed, this clarification "would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS."[16] The avalanche of TCPA class action cases in recent years is evidence that broad and ambiguous rules about what constitutes an ATDS spur litigation and impose significant costs.[17] Such an environment deters legitimate businesses from placing calls to consumers to convey important information.[18] Vague rules also increase costs to consumers, as businesses must defend lengthy class action cases that often cannot be resolved at the pleading stage. This uncertainty does not provide any meaningful consumer protection or other benefits. The only winners in this scenario are class action attorneys and a small cadre of vigilante professional plaintiffs. Congress seemingly is aware of the issue as well, and last year convened a hearing before the House Subcommittee on the Constitution and Civil Justice where it heard testimony regarding the abuse of the TCPA's remedy provisions in recent years.[19] Adopting a

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16 U.S. Chamber Petition at 22.

17 *See* 2015 TCPA Order, Dissenting Statement of Commissioner Ajit Pai ("the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014."). These statistics are even more startling in recent years, with a reported 46 percent increase in TCPA litigation since adoption of the 2015 TCPA Order. *See* U.S. Chamber Petition at 19. *See also id.* at 15 ("Under one analysis, the number of TCPA lawsuits increased from 2,127 in the 17 months prior to the FCC's 2015 *Omnibus Order* to 3,121 in the 17 months after the *Order*") (internal citations omitted).

18 *See, e.g.*, Reply Comments of the U.S. Chamber Institute for Legal Reform, CG Docket No. 02-278, 8 (filed Dec. 12, 2017) ("Presently, any company considering communicating with customers or the public must worry that even their best efforts cannot protect them from liability."). This uncertainty is not limited to the ATDS issue. *See, e.g.*, Comments of the Internet Association, CG Docket No. 02-278 et al., 11 (filed Mar. 10, 2017) (noting that "if companies are forced to guess about the continuing validity of a party's consent, they might 'discontinue texts' altogether, 'angering consumers that had specifically requested texts, for example, to remind them to pay a monthly bill, but then miss a payment because they didn't get a reminder.'") (internal citations omitted).

19 *See Lawsuit Abuse and the Telephone Consumer Protection Act: Hearing Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. On the Judiciary*, 115th

clear and bright-line definition of an ATDS based on the statute will provide greater certainty for legitimate contacts to consumers and may reduce the costs of class action abuse by enabling more cases to be resolved at the initial stages of litigation.

Opponents of a narrow ATDS definition grounded in the statute would have the Commission believe that such an approach would open the floodgates to unwanted and unlawful calls being placed to consumers.[20] These claims are simply untrue. First, the industry and the Commission are already taking numerous meaningful steps to prevent illegal calls from reaching consumers. Such initiatives include the SHAKEN/STIR call authentication framework[21] that has been expedited due to the work of the telecommunications industry-led Robocall Strike Force,[22] as well as the Commission's November 2017 order adopting "rules allowing providers to block calls from phone numbers on a Do-Not-Originate (DNO) list and those that purport to be from invalid, unallocated, or unused numbers."[23] Moreover, callers that place abusive and unwanted

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Cong. (2017) (statement of Becca Wahlquist, Partner, Snell & Wilmer, L.L.P., on behalf of the U.S. Chamber Institute for Legal Reform) (this "litigation ... is less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits."); *id.* (statement of Adonis E. Hoffman, Esq.) ("the average recovery for a consumer in a TCPA class action settlement was $4.12. Their lawyers, by contrast, received an average of $2.4 million. Something is wrong with this picture.").

20 *See, e.g.*, Comments of the National Consumer Law Center et al., CG Docket No. 02-278, 2 (filed May 18, 2017) (opposing a petition filed by All About The Message related to voicemail delivery services and claiming that "[i]f left unregulated by the TCPA, telemarketing and debt collection messages could easily overwhelm the voicemail boxes of consumers.").

21 The SHAKEN/STIR framework is an industry-developed standard to provide authentication for originating calls. It is intended eliminate the use of illegal spoofing by requiring the originating carrier to authenticate the caller and the number that is associated with the caller. *See Call Authentication Trust Anchor*, WC Docket No. 17-97, Notice of Inquiry, 32 FCC Rcd 5988 (2017).

22 *See* "Industry Robocall Strike Force Report" (Apr. 28, 2017).

23 *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9706 (rel. Nov. 17, 2017). *See also* Reassigned Numbers Second FNPRM, Statement of

calls to consumers often violate other state and federal regulations by engaging in other unlawful practices such as deceptive marketing, which is actionable by the Federal Trade Commission and/or state attorneys general (and, by the FCC, when conducted by common carriers and other entities within its jurisdiction). These callers also often employ illegal spoofing, which may subject them to enforcement by the FCC under the Truth in Caller ID Act.[24] The TCPA, however, was not designed to address such practices, and it would be inappropriate for the Commission to attempt to extend its reach by adopting improperly broad interpretations of the statutory language.

B. A Device's Present Capacity Should Determine Whether It Qualifies as an ATDS

The TCPA Public Notice asks how, "in light of the [D.C. Circuit] court's guidance that the Commission's prior interpretation had an 'eye-popping sweep,'" the Commission can "more narrowly interpret the word 'capacity' to better comport with the congressional findings and the intended reach of the statute."[25] The Joint TCPA Commenters submit that the proper interpretation starts with a rational understanding of what the equipment must have the capacity to do, as explained above. Once the functionality of the equipment is

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Commissioner Michael O'Rielly ("[N]othing about the court ruling or any subsequent Commission action will lead to more illegal robocalls. In fact, the Chairman deserves credit for proactively advancing items on call blocking and authentication that try to target calls from actual scammers. As many of us have stated, the Commission needs to remain focused on the bad actors, many of which operate overseas and would have snubbed the mindless 2015 Order just as they have ignored the Do Not Call List, which has become costly and ineffective as well. On the other hand, ideas that were designed to help legitimate businesses operate within the confines of the largely defunct Order need to be reexamined closely and methodically.").

24 *See, e.g., Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, File No.: EB-TCD-15-00020488, Forfeiture Order, DA 18-58 (rel. May 10, 2018) (imposing a penalty of $120 million for violations of the Truth in Caller ID Act).

25 TCPA Public Notice at 2.

properly identified, the Joint TCPA Commenters agree with the U.S. Chamber Petition that ATDS "functions must be actually – not theoretically – present and active in a device at the time the call is made" to satisfy the "capacity" requirement set forth in the TCPA.[26] More specifically, "devices that require alteration to add autodialing capability are not ATDS. Rather, the capability must be inherent or built into the device for it to constitute an ATDS."[27] This approach is grounded in the logic set forth by the D.C. Circuit, which noted that "[t]he Commission's capacious understanding of a device's 'capacity' [adopted in the 2015 TCPA Order] lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework."[28] Indeed, then-Commissioner Pai was correct in his observation that the term "capacity" in the TCPA denotes a clear Congressional intent to mean "present capacity" because "[h]ad Congress wanted to define [ATDS] more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't."[29] This basic axiom of statutory construction compels the conclusion that "capacity" must refer only to a device's capabilities and functionalities *at the time that a call is made*. Such a clarification also establishes "a clear, bright-line rule for callers"[30] and would provide much-

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26 U.S. Chamber Petition at 22.

27 *Id.* at 23.

28 885 F.3d at 698.

29 2015 TCPA Order, Dissenting Statement of Commissioner Ajit Pai.

30 U.S. Chamber Petition at 23.

needed clarity for courts that have on numerous occasions sought guidance from the FCC on this issue.[31]

These interpretations offer a significant benefit much needed in the private sector: predictability. Businesses need to be able to predict with a degree of confidence what rules apply when they communicate with their customers and the public (in market research or opinion polling, for example). Today's environment, where plaintiffs can allege that almost any call is made through an autodialer, leads to significant costs for businesses and discourages businesses from contacting their customers. By providing a rational definition of the functionalities that are needed, and by clarifying that the equipment must have the present capability to perform these functionalities, businesses will be better able to evaluate their own equipment and determine whether the TCPA applies to it. This will, in turn, reduce the uncertainty surrounding customer communications and allow businesses to plan the best way to get important information to consumers, from lower-priced offers, to important notices, to reminders involving service. The Commission should not underestimate the value that this predictability has in the market – and the tremendous cost that today's environment of uncertainty has imposed on businesses.

C. Callers Should Only Be Subject to the TCPA for Those Calls Made Using ATDS Functionality

The TCPA Public Notice also asks whether the statutory prohibitions apply to calls for which "a caller does not use equipment as an [ATDS]."[32] This question stems from the D.C. Circuit's observation that the phrase "make any call...using any" ATDS arguably limits the

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31 *See id.* at 17, n.21 (citing examples of cases which have stayed TCPA litigation pending guidance from the Commission on statutory interpretation).

32 TCPA Public Notice at 3.

scope of the restrictions set forth in Section 227(b)(1).[33] The Joint TCPA Commenters agree with the U.S. Chamber Petition and urge the Commission to "adopt the D.C. Circuit's roadmap and clarify that the TCPA is only implicated by the use of actual ATDS capabilities in making calls."[34] As with the definition of ATDS and capacity discussed above, this approach is consistent with the plain language of the TCPA. Indeed, as Commissioner O'Rielly observed in his statement accompanying the 2015 TCPA Order, "if the equipment [is] not used as an autodialer—for example, because the equipment lacked the present capacity or because calls were made with the aid of human intervention—then it would not meet the statutory test."[35] To interpret the word "using" otherwise would render it "vastly expanded and untethered from Congress' goals."[36] Additionally, the U.S. Chamber Petition is correct in its observation that "[b]usinesses need this clear guidance, and it would help them avoid unnecessary litigation over whether they used an ATDS when placing calls to their customers."[37] Accordingly, the Commission should clarify that a caller must use ATDS functionality when placing a call in order to be subject to the TCPA with respect to that call.

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33 885 F.3d at 704. The Court declined to fully address the issue, however, because it was not raised by the petitioners. *Id.*

34 U.S. Chamber Petition at 26.

35 2015 TCPA Order, Statement of Commissioner O'Rielly Dissenting in Part and Approving in Part.

36 U.S. Chamber Petition at 26.

37 *Id.* at 27.

II. THE COMMISSION SHOULD ESTABLISH A REASSIGNED NUMBER DATABASE AND A REASONABLE SAFE HARBOR FOR CALLERS WHO UTILIZE IT

The TCPA Public Notice seeks comment on several questions related to the issue of calls to reassigned numbers. The Joint TCPA Commenters herein respond specifically to the question of whether a reassigned number safe harbor is necessary,[38] as well as provide comments directly in response to the Reassigned Numbers Second FNPRM.

The Joint TCPA Commenters strongly support the proposal to create a single, central database of reassigned numbers, and further agree with Commissioner O'Rielly's observation that "the true benefit of a database would be to provide legitimate callers a safe harbor from financially-crippling litigation [that might otherwise arise] simply because they unwittingly called a number that they thought belonged to a consenting customer."[39] Accordingly, the Joint TCPA Commenters urge the Commission to adopt a reasonable safe harbor that provides certainty and incentive for callers to use the reassigned number database.

In particular, the safe harbor should provide protection against liability for all reassigned-number calls made by a particular caller within 30 days of the caller "dipping" the reassigned number database. A 30-day period after checking numbers in the database is reasonable and avoids unnecessary queries to the database. Indeed, requiring callers to query the reassigned number database before each individual call in order to invoke the safe harbor could overwhelm the database due to the sheer volume of "dips" that would be required. This could undermine the operation of the database and effectively render a safe harbor null and void. By

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38 TCPA Public Notice at 4.

39 Reassigned Numbers Second FNPRM, Statement of Commissioner Michael O'Rielly.

contrast, a 30-day liability shield, which has support in the record in this proceeding,[40] would incentivize callers to regularly check the database, but without imposing an undue burden on users.

A safe harbor is a key to ensuring that the database functions as intended. As the Joint TCPA Commenters understand it, the Commission's goal is to create as comprehensive resource as is possible to better inform callers whether a customer has changed their phone number since consent was given. This database, however, will never be completely accurate, and still might contain incorrect information – both false negatives (no change in numbers) and, as discussed later, false positives (indicating a change when one has not occurred). Where the database provides information indicating a change, the caller can take action *before* placing a call to the subscriber. This will make it less likely that an innocent third party will receive a call that they did not authorize. As a result, consulting the database will further the Commission's goal of reducing unauthorized ATDS or pre-recorded message calls.

On the other hand, where the database indicates no change, but does so incorrectly (*i.e.*, a false negative), the caller might face a claim from the person actually

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40 *See, e.g.*, Letter from Harold Kim, Executive Vice President, U.S. Chamber Institute for Legal Reform, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, 3 (filed Aug. 28, 2017) ("U.S. Chamber Aug. 28, 2017 Letter") (arguing that a business should be able to avail itself of a safe harbor from TCPA violations whenever it "(1) accesses and scrubs against that database/query system in a reasonable timeframe (i.e., every 30 days), and (2) has policies and procedures (such as training) to ensure that customer records are updated to reflect phone number reassignments."); Letter from Jonathan Thessin, Senior Counsel, Center for Regulatory Compliance, American Bankers Association, to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, 6-7 (Sept. 26, 2017) (supporting a safe harbor "when the caller (a) reviewed information in the [reassigned number] Resource within the past 31 days to determine whether the number had been reassigned, and (b) received no information that the number had been reassigned.").

answering the phone. A safe harbor is necessary to address this possibility. Only through a safe harbor will callers have the incentive to rely upon the database in all instances. Only through a safe harbor can the database become a comprehensive resource for the calling public. If the database could be consulted by a party (incurring the additional cost of the database access) but still might produce liability, some callers may choose *not* to consult the database, undermining the Commission's goal of reducing unauthorized calls. A safe harbor, however, removes this possibility, and encourages everyone to consult the database to obtain better information.

Additionally, the safe harbor should have a process component that offers protection beyond the false negative situation. This database should offer protection for all misdirected calls (including misdialed calls), so long as the caller follows rigorous, industry best practices, such as implementing written policies and procedures and providing regular personnel training, that are designed to facilitate compliance with the TCPA and Do Not Call requirements.[41] This added protection against unintentional errors will further incentivize callers to consult the database and to build its results into the caller's practices and procedures. The Joint TCPA Commenters respectfully submit that if the Commission carefully crafts the contours of the safe harbor as described herein, unlike the one-call safe harbor adopted through the 2015 TCPA Order, it could withstand a challenge before the judiciary should one arise.

The Reassigned Numbers Second FNPRM seeks comment on the Commission's legal authority to adopt a safe harbor. The Joint TCPA Commenters respectfully submit that the Commission need look no further than the language of section 227 to confirm such authority. Specifically, section 227(b)(1)(A) establishes that callers may place calls with the "prior express

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41 *See* U.S. Chamber Aug. 28, 2017 Letter at 8.

consent of the called party."[42] In overturning the one-call safe harbor adopted in the 2015 TCPA Order, the D.C. Circuit concluded that limiting the safe harbor to a single call was arbitrary and capricious.[43] However, the court did not question the Commission's legal authority to adopt a safe harbor for calls to reassigned numbers, and in fact cited "prior express consent of the called party" as the "pertinent" language in section 227(b)(1)(A) against which to evaluate a safe harbor.[44] The Commission therefore would be well within its regulatory purview to declare that "consent," which remains effective until revoked by the consenting party,[45] also remains valid unless the caller knows or reasonably should know that the phone number has been reassigned by virtue of "dipping" the reassigned number database.

Finally, the Joint TCPA Commenters urge the Commission to carefully weigh the information that would populate the database. The Commission should ensure that the information strikes the proper balance between ensuring its comprehensiveness and avoiding unnecessary reporting burdens on carriers and other service providers. It should also ensure that the information is as accurate as possible, and minimizes costs imposed by false positives.

In particular, the Joint TCPA Commenters urge the Commission to carefully examine what action constitutes a "disconnect" for purposes of reporting to the database. The Commission should ensure that reporting of a disconnect matches actual changes in the

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42 47 U.S.C. § 227(b)(1)(A).

43 885 F.3d at 705.

44 *Id.*

45 *See* 2015 TCPA Order ¶ 54 (a "caller may reasonably rely on the valid consent previously given and take the consumer at his word that he wishes for the caller to contact him at the number he provided when the caller obtained the consent.").

subscriber as closely as possible. The Commission should examine, for example, whether the separation of a joint account into two individual accounts (such as when an adult child leaves a family plan, or in instances of divorce or other change in status) results in a disconnect being reported. Similarly, the Commission should examine whether a change in the customer's name will be reported as a "disconnect." At a minimum, the Commission should examine whether logic such as that employed in the National Lifeline Accountability Database (NLAD) to identify duplicate subscribers could be employed to ensure that the Reassigned Number database only reports actual subscriber changes. Getting such information right is important, because the instances described above may not actually reflect a change in the subscriber, but might simply reflect a change in the subscriber's status.

The Commission should also examine how temporary changes in a number are reported. Would a temporary suspension of the account for non-payment be reported as a disconnect/reassignment? Would seasonal suspensions and re-activations be reported as a disconnect/reassignment? The Commission should gather information on how these situations are handled in order to ensure that the database minimizes the problem of false positives.

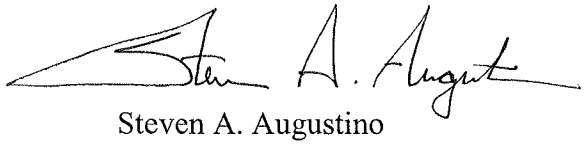
The Joint TCPA Commenters are concerned about false positives because each false positive will impose a cost on the caller querying the database. If the database returns information that the subscriber has changed, the caller will not place the call and likely will resort to an alternative method to seek to update information from the subscriber. This outreach will impose costs on the caller – costs to communicate via another method – that will deprive the subscriber, at least temporarily, of the information that would have been imparted on the call, and may result in unnecessary annoyance to the subscriber, as he or she must confirm information already provided to the caller. Because of these costs, the Commission should

endeavor to ensure that the database accurately reflects actual reassignments to a new subscriber – and only actual reassignments, not changes that do not involve a change in the subscriber or authorized user.

CONCLUSION

The Joint TCPA Commenters respectfully request that the Commission take these comments into consideration and expeditiously issue an order clarifying the issues discussed herein.

Respectfully submitted,



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